83-1713



No. A-729

IN THE

SUPREME COURT OF THE UNITED STATES

---

OCTOBER TERM, 1983

---

Peter H. Ransom, Petitioner

vs.

State of Kansas Respondent.

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# BRIEF IN OPPOSITION TO THE GRANTING OF A PETITION FOR A WRIT OF CERTIORARI

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DAN BILES*
Assistant Attorney General
for the State of Kansas
Kansas Judicial Center
Topeka, Kansas 66612
(913) 296-2215

STEVEN L. OPAT
Geary County Attorney
Courthouse
Junction City, Kansas 66441
(913) 762-4343

Attorneys for Respondent

## QUESTIONS PRESENTED

1. Does the Supreme Court of the United tates have jurisdiction to consider the granting f the petition for a writ of certiorari under he facts of this case?

2. Does petitioner have a vested right in ow the Kansas Supreme Court establishes the ppellate procedure of the Court?

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No. A-729

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Respondent State of Kansas respectfully suggests that there is no jurisdiction for the Honorable Court to grant petitioner's request for a writ of certiorari to issue, and, therefore, prays that the Court deny the same.

## OPINIONS BELOW

Copies of the Opinions and Judgments of the Court entered on March 31, 1983, May 6, 1983, December 2, 1983 and January 20, 1984 are reproduced and attached to this petition in the Appendix.

## JURISDICTION

Respondent respectfully points out that there were no interpretations rendered by the Kansas Supreme Court upon any constitutional issue, either state or federal; that there appears no issue to be considered that is of a substantial federal nature; that, therefore, the Court has no jurisdiction.

## CONSTITUTIONAL PROVISIONS INVOLVED

Respondent believes that no constitutional provisions are applicable herein.

## STATEMENT OF THE CASE

On July 3, 1981, the victim, Ms. B., was attacked, severely beaten, and brutally raped in rural Geary County, Kansas. Twelve days later, on July 15, 1981, the defendant was arrested and charged in district court in case number 81-CR-399 with aggravated kidnapping, rape, aggravated battery and aggravated robbery. Counsel was appointed to represent the defendant at his first appearance on July 17, 1981. Ultimately the defendant retained his own counsel who has represented him throughout these proceedings. The defendant was arraigned in Geary District Court in case No. 81-CR-399 on August 13, 1981, on charges of aggravated kidnapping, rape, aggravated battery and aggravated robbery. On March 4, 1982, the State requested a continuance,

citing as grounds its difficulty in obtaining the presence of three witnesses, including two doctors who planned to be out of state on the proposed trial date. On March 5, the trial court denied the requested continuance, and the State immediately moved to dismiss the case without prejudice. That motion was granted. At that time, 121 days were chargeable to the State. Defendant had been free on bond. Four days later a new case, No. 82-CR-111, was filed. The new case charged the defendant with the same offenses. Defendant was arraigned on March 31, 1982. Trial was set to commence on May 3, 1982. The State again experienced trouble securing the attendance of an out-of-state medical witness, and moved for a continuance. The trial court granted the motion on April 20 and set the case for trial at 8:30 o'clock a.m., on June 9, 1982. On June 7, defendant moved for discharge and the trial court sustained that motion. The court found that under the doctrine

adopted by this court in State v. Cuezze, Houston & Faltico, 225 Kan. 274, 589 P.2d 626 (1979), the time spans chargeable to the State in the two cases must be totaled; that the defendant had been held to answer in both cases for a total of 189 days; and that since the State had failed to bring him to trial within the 180-day period prescribed by K.S.A. 22-3402(2), he was entitled to be discharged. That statute provides as follows:

> "(2) If any person charged with a crime and held to answer on an appearance bond shall not be brought to trial within one hundred eighty (180) days after arraignment on the charge, such person shall be entitled to be discharged from further liability to be tried for the crime charged, unless the delay shall happen as a result of the application or fault of the defendant, or a continuance shall be ordered by the court under subsection (3)."

The Supreme Court of Kansas initially held that the trial court was correct in its analysis of the state statute (e.s.) on speedy trial. The vote was a 4-3 vote, with the dissent

expressing disbelief over the emphasis placed upon the "Guidelines" and lack of a finding of "necessity" by the majority.

Upon Motion for rehearing, which was granted, the Court again considered the matter. By a 4-3 vote, the court reversed itself and remanded for trial stating:

> In Kansas, we recognize both the constitutional right to a speedy trial and the right to a speedy trial enunciated by K.S.A. 22-3402. See State v. Rosine, 223 Kan. 663, 664 P.2d 852 (1983), where both rights are fully discussed and distinguished. Here, there is no claim of a constitutional violation. (e.s.) In this case we are only concerned with the statutory right... to avoid the statutory time limitations, the State must make a showing of necessity.
>
> We turn now to the facts in the case before use in order to determine whether the State made a showing of necessity at the time it dismissed the original case against Ransom. The State moved for a continuance of the trial date for the reason that one witness had absconded and two of its principal witnesses had serious conflicts with the trial setting. Both of the later were physicians; one was stationed at Fort Riley, Kansas, at the time the offense was committed, and both were significant and important State witnesses. One had conducted the initial examination

of the victim and had taken the "rape kit" which was submitted to the Kansas Bureau of Investigation laboratory. The other had taken blood samples, saliva samples, and pubic hairs from the defendant, pursuant to the Court's order, and these had been submitted to the same laboratory for examination and comparison. The testimony of both witnesses was thus necessary to lay the foundation for the critical expert testimony. Dr. Daniels was not a local resident; he was only temporarily stationed at Forty Riley, and he had left that station and had been separated from the military service before the case could be tried. Dr. Daniels was scheduled to take his Minnesota medical board examinations at the time of trial. This event, as Justice McFarland pointed out in her dissent to the original opinion, 233 Kan. at 194, is a significant event in a physician's professional career and not a date which he can control or alter. The other physician had a long-standing commitment to attend a professional meeting in New York City. The trial court, upon hearing the State's motion, made the specific findings set forth verbatim in Justice McFarland's dissent, 233 Kan. at 195-96. In short, the court found that no prejudice (e.s.) would occur to the defendant if the matter was dismissed without prejudice; that technical problems in securing the appearance of witnesses had arisen; that these problems were neither the fault of the State nor the defendant; that neither side was operating tactically to try to gain an advantage over the other; and that both parties had acted diligently. The court concluded, however, that in view of the Guidelines adopted by the Supreme Court for the handling of criminal cases, the motion for a

continuance must be denied. The State promptly moved to dismiss without prejudice. The journal entry accurately reflects this action:

> WHEREUPON, the Court considers the motion of the State for a continuance. The Court entertains the statements of counsel and ascertains that there is no objection from the defendant to the continuance proposed by the State of Kansas. The Court further considers the file in this case and the reasons proffered by the State for the proposed continuance. The Court specifically notes that this case has been continued three (3) times previously and the Court further notes that the County Attorney has exercised due diligence in attempting to secure the attendance of the witnesses essential to this cause. In considering the Motion, the Court finds, however, that certain guidelines proposed by the Supreme Court must likewise be considered in determining whether or not the motion should be granted. The Court, therefore, finds based on the evidence previously adduced before it, based upon the evidence presented herein, and based upon the guidelines and case law which pertains to the issues raised herein, that the motion for continuance should not be granted. The Court specifically finds that in denying said motion, however, that the State is not attempting to obtain a tactical advantage in seeking a continuance, that no prejudice had adhered to the defendant thus far, in terms of his right to a speedy trial as the same is statutorily defined.

> The Court finds that neither party has been less than diligent in their efforts to bring this matter to trial.
>
> WHEREUPON, the State moves to dismiss this matter without prejudice, stating to the Court that the same being a need of necessity since the State is unable to proceed without the testimony of the three (3) witnesses that were mentioned in their affidavit.
>
> WHEREUPON, the Court, based on its previous rulings and hearing no objection from the defendant's counsel, finds that the matter should be dismissed without prejudice. The Court further adopts its previous rulings. . . .
>
> IT IS SO ORDERED.

While the judge did not specifically find that the State made a showing of necessity, such a finding is implicit in the record and in the findings made. The State had its witnesses under subpoena, but it was wary lest, in the face of the serious conflicting commitments, the witnesses would not appear. If the State proceeded with trial and either one of the witnesses failed to appear, the State's case would be badly crippled. True, the State could later cite the witness for contempt, but that would not fill the resulting void in the State's presentation of its criminal case against the defendant. Witnesses do not always appear, even though they are ordered to do so. Some are stricken on the way to the courthouse; others are hospitalized and undergo surgery. Such problems cannot be anticipated. Other conflicts, however, can. Professional examinations, such as bar, medical and dental examinations, are given only at

> stated times and places; and an aspiring professional might well be tempted to ignore a subpoena which conflicted with such an examination, even in light of the probable contempt citation. The State anticipated this and sought a different trial setting within the remaining 59 days available to it within the statute. Upon the denial of its motion for a continuance, the State dismissed and refiled rather than chance a trial at which one or more vital witnesses would be absent.
>
> Upon this record, we conclude that the State made a showing of necessity. The Cuezze doctrine, therefore, is inapplicabl The dismissal being made upon a showing of necessity, the computation of the statutory time commenced anew. One hundre eighty days had not expired from the date of arraignment, March 31, 1982, to the date of dismissal.
>
> The judgment is reversed, with instruction to set aside the dismissal.
>
> Upon remand, the matter was set for trial.

Witnesses were subpoenaed and the State was ready to proceed. The matter was then stayed (i.e., continued) at the defendant's request, destroying <u>any further issue</u> of his right to a speedy trial pursuant to K.S.A. 22-3402. <u>No motion</u> (e.s.) was or has been filed raising <u>any</u> (e.s.) issue of the petitioner's right to a speedy trial as constitutionally defined.

See Appendix H.

## REASONS FOR DENYING CERTIORARI

I. DOES THE SUPREME COURT OF THE UNITED STATES HAVE JURISDICTION TO CONSIDER THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI UNDER THE FACTS OF THIS CASE?

A.

As the Kansas Supreme Court noted in 234 Kan. 322, at 325, the issue of any constitutional violation of the defendant-petitioner's right to a speedy trial has never (e.s.) been addressed below. The only issue that has ever been raised is the construction of K.S.A. 22-3402 and its effects upon the facts of this case.

The general rule applicable to appellate procedure is that objections not raised in the lower court cannot be reviewed upon appeal. As set forth in 14C.J.S. Certiorari, §149, p. 286, et seq.:

> Objections not raised or decided in the lower court ordinarily will not be considered on review, except as to questions of public policy or jurisdiction.

> The rule applicable to appellate procedure generally, that objections not raised in the lower court cannot be relied on in the appellate court; as anounced.... This rule applies to objections, not raised or ruled on below, as to the constitutionality of a statute,[75] the form of the remedy,[76] the competency of witnesses,[77] the admissibility of evidence,[78] that there was a failure to prove,[79] or that there was a variance between the allegations and the proof.[80]....
>
> The claim of exclusive federal jurisdiction will not be recognized as a basis for review by certiorari unless the question has been raised in the trial court and presented as a basis of the writ, where the state appellate tribunal is circumscribed in its discussion of the case to errors appearing on the record, unless the question presented is one dealing with the jurisdiction of the court or general policy of the state.[90]

B.

There is, therefore, no federal question of (any) substantial nature to be decided in accordance with the requirements of Rule 19. Where certiorari is sought from the decision of the highest state court, only federal issues are reviewable, and a state issue is not subject to review no matter how thoroughly convinced anyone is that the state court misconstrued

its own law. Herein the Kansas Supreme Court has construed and applied K.S.A. 22-3402. There simply is no (e.s.) federal issue which this court should consider, nor is any stated. As Justice Harlan stated in "Manning the Dikes-- Some Comments On The Statutory Certiorari Jurisdiction And Jurisdictional Statement Practice Of The Supreme Court":

> At the time an appeal... is docketed the appellant must file... a statement showing, among other things... that the federal question sought to be presented is substantial, if the appeal is from a state court;...". 13 Record of N.Y.C.B.A. 541, at 542-46 (1958).

C.

Respondent also suggests that this is not the proper time for petitioner to seek relief via certiorari. There is no final judgement from which relief can be had. The case has been remanded for trial by the Supreme Court, with orders to set aside dismissal (previously entered).

"A final judgment is... one which puts an end to a suit or action... A judgement which disposes of the subject matter of the controversy or determines the litigation as to all parties on its merits..." See Black's Law Dictionary, Revised Fourth Edition, 1968, p. 979.

Petitioner is attempting to try his case "piecemeal". As the Kansas Supreme Court has stated in exercising its appellate jurisdiction:

"Piecemeal appeals are frowned upon in this state."

See Connell v. State Highway Commission, 192 Kan. 371, 374, 388 P.2d 637 (1964); also State v. Ramirez, 175 Kan. 301, 309, 263 P.2d 239 (1953).

When remanded for trial, the petitioner chose to abandon his claim of denial to a statutorily (e.s.) defined trial and instead now seeks a remedy upon grounds never previously raised. See Appendix H.

II. DOES PETITIONER HAVE A VESTED RIGHT IN HOW THE KANSAS SUPREME COURT ESTABLISHES THE APPELLATE PROCEDURE OF THE COURT?

Petitioner submits nothing for the Court to consider upon the issue of rehearing except innuendo and wild speculation. First, petitioner states "It should be noted that Justice Tyler C. Lockett, a personal friend of Kansas Attorney General, Robert T. Stephen (sic, Stephan), was appointed to replace the late Alex M. Fromme."; see petition, p. 7. Next petitioner asserts that: "The only reason stated for the rehearing by the Kansas Supreme Court was the replacement of Justic Alex M. Fromme by Justice Tyler C. Lockett." See petition, p. 18.

Respondent would ask: (1) is petitioner insinuating that Justic Lockett would cast his vote one way or the other because of his alleged friendship with the Attorney General (which hasn't been demonstrated except by innuendo); (2) where is the evidence for the supposition by petitioner that the rehearing was granted because of a "replacement"?

Respondent suggests that petitioner has provided no evidence via the record to support either spurious assignation. The insinuations raised are contemptible and not worthy of further comment except to say that they exist only in the mind of petitioner.

The rules established by the legislature for appellate practice and procedure and the rules promulgated by the Supreme Court pursuant thereto have been followed in this case. See Appendix F & G.

Matters of appellate procedure, like other questions of procedure, are within the control of the legislature, and may be regulated by statutes applicable to pending proceedings[85]... Apart from statutory or constitutional authorization, the courts themselves may change judicially established rules of appellate procedure without impairing vested rights. See 16 c.J.S.§272C, at p. 1271-72.

As the Kansas Supreme Court has stated on numerous occasions:

> The right to an appeal is neither a vested right nor a constitutional right (e.s.). It is purely statutory, maybe limited by the legislature to any class of cases or in any manner or may be entirely withdrawn.

See In re Municipal Airport Condemnation of City of Hutchinson v. C.D. Wagoner, 163 Kan. 735, 186 P.2d 248 (1947), at syl. 2; and in re Powell, 167 Kan. 283, 205 P.2d 1193 (1949), at syl. 1; City of Wichita v. Mesler, 8 Kan. App. 2d 710, 666 P.2d 1209 (1983).

## CONCLUSION

Certiorari should be denied herein for the following reasons: (1) the question raised by the petitioner was not raised below in any court of competent jurisdiction; (2) there is no federal question presented; (3) there is not yet a final judgment upon which an appeal can be predicated; (4) the petitioner has no vested right as to the manner in which the Court establishes and conducts its appellate procedure; (5) the petitioner has had a full and fair opportunity below to litigate his claim with reference to the state right; (6) the petitioner offers nothing to support his claims but speculation, bald conclusion and spurious accusation.

Respectfully submitted,

DAN BILES*
Assistant Attorney General
for the State of Kansas
Kansas Judicial Center
Topeka, Kansas 66612
(913) 296-2215

STEVEN L. OPAT
Geary County Attorney
Courthouse
Junction City, Kansas 66441
(913) 762-4343

Attorneys for Respondent

No. 54,636

STATE OF KANSAS, *Appellant*, v. PETER H. RANSOM, *Appellee*.

SYLLABUS BY THE COURT

CRIMINAL LAW—*Speedy Trial Requirements—Dismissal of Charges by State's Own Motion and Refiling of Information—Calculation of Time.* Where the dismissal of criminal charges results from the State's own motion and is not accompanied by a showing of necessity, and a new information is filed charging the same offense, when calculating the speedy trial time requirement of K.S.A. 22-3402 a court must include the time elapsed between arraignment and dismissal of the first prosecution together with the time elapsed between arraignment and trial of the second prosecution.

Appeal from Geary district court; WILLIAM D. CLEMENT, judge. Opinion filed March 31, 1983. Affirmed.

*David R. Platt*, assistant county attorney, argued the cause, and *Steven L. Opat*, county attorney, and *Robert T. Stephan*, attorney general, were with him on the brief for the appellant.

*Charles A. Chartier*, of Junction City, argued the cause and was on the brief for the appellee.

The opinion of the court was delivered by

SCHROEDER, C.J.: This is an appeal by the State pursuant to K.S.A. 22-3602(*b*)(1) from an order dismissing an information charging Peter H. Ransom (defendant-appellee) with rape (K.S.A. 21-3502), aggravated battery (K.S.A. 21-3414) and aggravated robbery (K.S.A. 21-3427). At issue is the computation of time for purposes of the appellee's statutory right to speedy trial under K.S.A. 22-3402.

On July 3, 1981, the victim, Ms. B., was attacked, severely beaten, and brutally raped in rural Geary County, Kansas. Twelve days later, on July 15, 1981, the defendant was arrested and charged in district court in case number 81 CR 399 with aggravated kidnapping, rape, aggravated battery and aggravated robbery. Counsel was appointed to represent the defendant at his first appearance on July 17, 1981. Ultimately the defendant retained his own counsel who has represented him throughout these proceedings.

A preliminary hearing was held on August 6, 1981, and the appellee was bound over to stand trial. A week later, on August 13, 1981, the defendant was arraigned and pled not guilty. The defendant remained in confinement until September 10, 1981, at which time he was able to post bond. Trial was set for November 5, 1981. On October 27, 1981, the defendant obtained a continu-

ance to December 3, 1981. On November 30, 1981, the State obtained a continuance to January 18, 1982. On January 14, 1982, the matter was continued by agreement of counsel to March 11, 1982. These continuances were obtained because of difficulties in obtaining essential witnesses.

On March 4, 1982, the State moved for a further continuance, citing difficulty in obtaining two essential witnesses. Both witnesses were doctors who were vital to the chain of forensic evidence in the case, one of whom had conducted the initial examination of the victim and obtained evidence for the "rape kit." Both doctors were planning to be out of the state on the date trial was scheduled; one would be in New York attending a professional meeting and the other would be in Minnesota taking his medical board examinations. At the hearing on the earlier motion for continuance granted January 14, 1982, the court expressed its concern about the long delay in bringing the defendant to trial and indicated that counsel for both sides should *take steps to ensure that essential witnesses would be available for trial scheduled March 11, using compulsory process if necessary.*

At the time of the hearing on March 5, 1982, three continuances had been granted and a total of 121 days had elapsed from the arraignment which were chargeable to the State. The State informed the court that approximately 60 days were left of the 180 days allowed by K.S.A. 22-3402 to bring the defendant to trial. The defendant's counsel indicated he had no objection to the requested continuance. Although the court recognized that technical problems in trying the case existed which were not the fault of either party, the court denied the motion to continue because of the number of times the case had previously been continued. The court further determined that should the State elect to dismiss the action no prejudice would occur to the defendant.

The State then orally moved to dismiss the case without prejudice. In granting the motion the court cautioned counsel that the speedy trial issue could be a problem if the case was refiled.

Four days later, on March 9, 1982, the State filed identical charges against the defendant in district court case number 82 CR 111. The preliminary hearing was continued at the request of

the defendant to March 31, 1982. At that time the appellant waived the preliminary hearing and pled not guilty. Trial was set for May 3, 1982. Due to the unavailability of an essential witness the State moved for a continuance on April 30, 1982. Trial was rescheduled for June 9, 1982.

A hearing was held on June 7, 1982, to consider motions by the State to hold a *Jackson v. Denno* hearing and to endorse additional witnesses and a motion by the defendant to dismiss for failure to comply with the speedy trial provisions of K.S.A. 22-3402. Finding the defendant's speedy trial motion dispositive the court considered it first.

The court found that 121 days which were chargeable to the State had elapsed from the time of the first arraignment until dismissal of the charges on March 5, 1982, in case number 81 CR 399, and that 90 days had elapsed from the date the charges were filed in case number 82 CR 111. When combined, the time chargeable to the State in these two cases exceeded the 180-day time limit set forth in 22-3402(2). In its memorandum and journal entry of dismissal the trial court specifically rejected the State's proposed finding of fact that the March 5, 1982, dismissal was a matter of necessity, and made the following conclusion:

"The Court finds that 82 CR 111 is a case where no good reason has been shown to extend the legislatively imposed rule of limitations for reason urged by the State. Accommodation of the States witnesses by the prosecutor (thereby delaying the case beyond the 180 day rule plus the statutes' permitted extensions) is not a reason sanctioned by statute or case law to extend the period within which a case may be tried."

The sole issue presented on appeal is whether the trial court properly combined the post-arraignment time chargeable to the State in case number 81 CR 399 with the post-arraignment time in case number 82 CR 111 in calculating the 180-day limit imposed by K.S.A. 22-3402(2) for bringing the defendant to trial. Where, as here, the defendant is released on bond, K.S.A. 22-3402(2) governs the time limits within which the defendant must be brought to trial following arraignment. It provides:

"If any person charged with a crime and held to answer on an appearance bond shall not be brought to trial within one hundred eighty (180) days after arraignment on the charge, such person shall be entitled to be discharged from further liability to be tried for the crime charged, unless the delay shall happen as a result of the application or fault of the defendant, or a continuance shall be ordered by the court under subsection (3)."

The right to speedy trial provided by this statute does not attach until the defendant is arraigned. *State v. Taylor*, 3 Kan. App. 2d 316, Syl. ¶ 4, 594 P.2d 262 (1979); *State v. Smith*, 215 Kan. 34, 39, 523 P.2d 691 (1974). For this reason it is important to note that the time chargeable to the State in the second case did not commence until March 31, 1982, when the defendant was arraigned, and not on March 9, 1982, when the case was refiled and the defendant arrested, as the trial court erroneously concluded. The time elapsed from the defendant's arraignment to June 7, 1982, when the case was dismissed, totaled 68 days, for an aggregate sum of time chargeable to the State in the two cases of 189 days.

The opposing views as to the effect of the dismissal of original charges and the filing of subsequent identical charges on a defendant's right to speedy trial is set forth in 21A Am. Jur. 2d, Criminal Law § 852.

"Under a statute which provides that an accused must be discharged if not brought to trial within a certain period after arrest or indictment, there are two views as to the effect of the dismissal of the original indictment or information and the bringing of a subsequent indictment or information. One is that the statutory time is to be computed from the time of the later indictment or information, the theory being, broadly, that the original proceeding became a nullity on its dismissal and that the new accusatory pleading represents the institution of a new and independent proceeding to which the statute can be applied without reference to anything which may have previously occurred. The second theory applied in such circumstances is that to permit the state to deprive an accused of the right to a discharge by the simple expedient of nolle prossing the original indictment and procuring a new indictment for the same offense is, in effect, to rewrite the statute, which, especially since statutes of the kind in question were passed to implement the constitutional guaranty of a speedy trial, ought rather to be given such a construction by the courts as to secure the ends sought by the legislature."

See also 22A C.J.S., Criminal Law § 468; Annot., 30 A.L.R.2d 462.

Where the State fails to bring the accused to trial within the time limits fixed by the statute, and where the delay is not due to the application or fault of the defendant or to extensions of time as provided by K.S.A. 22-3402(3), Kansas appellate courts have not hesitated to enforce the legislative mandate and order the defendant discharged. *State v. Warren*, 224 Kan. 454, 457, 580 P.2d 1336 (1978); *State v. Cox*, 215 Kan. 803, 528 P.2d 1226 (1974); *State v. Sanders*, 209 Kan. 231, 495 P.2d 1023 (1972).

However, delays which are the result of the application or the fault of the defendant are not to be counted in computing the statutory period. It is the State's obligation, not the accused's, to provide the defendant with a speedy trial in conformity with both the Constitution and statute. *State v. Warren*, 224 Kan. at 456. Finally, should the State desire a continuance it must bring its motion within the appropriate statutory period. *State v. Cox*, 215 Kan. at 805.

The issue presented here has been addressed by this court previously in *State v. Fink*, 217 Kan. 671, 538 P.2d 1390 (1975), and *State v. Cuezze, Houston & Faltico*, 225 Kan. 274, 589 P.2d 626 (1979). In *Fink* the defendant was originally charged on April 10, 1973, but because the defendant was not provided with a preliminary hearing within the time provided by statute the charges were dismissed on November 27, 1973. Shortly thereafter the case was refiled and the defendant moved to dismiss. In June 1974, the lower court held that the fourteen-month delay from the time of the defendant's arrest in the first case to the hearing on the motion to dismiss had violated the defendant's right to speedy trial and dismissed the charges. On appeal this court reversed, holding:

"The dismissal or *nolle prosequi* of a criminal charge entered prior to the arraignment and trial of an accused is not a bar to a subsequent prosecution for the same offense. (*Kenreck v. State*, 198 Kan. 21, 24, 422 P.2d 894 and authorities cited.) The same is true where a charge has been dismissed against a prisoner prior to the expiration of the time limitation, and a second information is filed. The time elapsing between the filing of the first information and the dismissal of the cause by the court is not to be counted in determining the time elapsed between the filing of the second information and trial." 217 Kan. at 675.

*Fink* is readily distinguishable from the present case in that the dismissal of the first information occurred before arraignment and therefore K.S.A. 22-3402 did not apply. Furthermore, the first information was dismissed pursuant to the defendant's own motion.

In *Cuezze* defendants Cuezze and Houston were indicted and arraigned on charges of making false writings and conspiracy. Months later, before dismissing the charges, the State filed identical charges against the defendants in a second case, naming Faltico as an additional defendant. Subsequently the State dismissed the first case against Cuezze and Houston. The time elapsed from arraignment on the first charges until the dismissal

of the second case was over 300 days. The Supreme Court distinguished the case from *Fink*, emphasizing that in *Cuezze* the second case was filed while the first case was still pending so that the defendants had remained continuously charged from the time of their first arraignment.

In the opinion the court said:

"[T]he purpose of K.S.A. 22-3402 is to implement and define the constitutional guarantee of a speedy trial and the statute establishes certain maximum time limits within which a defendant must be brought to trial. Absent a showing of necessity, the State cannot dismiss a criminal action and then refile the identical charges against the same defendant and avoid the time limitations mandated by the statute. As pointed out by the trial court, our prior cases relied upon by the State arose out of different factual situations or issues than those now before the court. It should also be noted that no attempt was made by the State to secure additional time in the first case to develop evidence as contemplated by K.S.A. 1978 Supp. 22-3402(3)(*c*)." 225 Kan. at 278.

In the present case the trial court specifically rejected the State's proposed finding of fact that the dismissal of the first case was a matter of necessity, although it was recognized at the time the motion for continuance was denied that technical problems had arisen in the case which were not the fault of either party. Under the holding in *Cuezze*, as there was no showing of necessity, the State here could not dismiss its first case, 81 CR 399, and refile the charges in case number 82 CR 111 to avoid the time limitations mandated by K.S.A. 22-3402. Support for this result is found in a recent opinion by the Court of Appeals which involves a situation factually similar to the instant case, also arising from Geary County. In *State v. Hunt*, 8 Kan. App. 2d 162, 651 P.2d 967 (1982), the defendant was initially arraigned on November 10, 1980. On March 31, 1981, the date trial was to commence, the State moved to dismiss without prejudice because an essential witness was not available. Four days later the State refiled the charges. The defendant was arraigned for the second time on May 13, 1981. By the time the defendant was brought to trial on July 27, 1981, 259 days had elapsed from the first arraignment on November 10, 1980. Finding the combined time in the two cases to be in excess of 180 days the Court of Appeals held:

"We find *Cuezze* to be controlling and hold that defendant's statutory right to a speedy trial on the aggravated assault charge was violated. Though there was a four-day gap between the dismissal of the first and the filing of the second information, the dismissal resulted from the State's own motion and was not accompanied by a showing of necessity." 8 Kan. App. 2d at 166.

The holding in the case was succinctly stated in the syllabus:

"When an information is dismissed by the State on its own motion after the defendant has been arraigned, and thereafter the State causes to be filed a new information charging the same offense, the State, when calculating the speedy trial time requirements of K.S.A. 22-3402, must include the time elapsed between arraignment and dismissal of the first prosecution together with the time elapsed between arraignment and trial of the second prosecution.

"The State cannot avoid the statutory speedy trial time limits by dismissing an information and subsequently refiling the charges. The proper procedure for the State to follow is to obtain a continuance pursuant to K.S.A. 22-3402(3)." 8 Kan. App. 2d 162, Syl. ¶¶ 2, 3.

In the case at bar the State did seek to obtain a continuance prior to dismissing the charges. The trial judge apparently did not believe a fourth continuance in the case was justified, in accord with his prior admonition to the parties concerning the necessity of bringing the defendant to trial without lengthy delay and to ensure that essential witnesses would be available for trial, serving them with compulsory process if necessary. Both doctors, whose attendance at trial was sought, had been supoenaed shortly after the continuance granted on January 14, 1982. However, upon learning these witnesses had conflicting plans to be out of the state on the date of trial, the State sought a continuance to avoid interrupting the witnesses' plans. There is no indication in the record that the State made any attempt to enforce the subpoenas and require the witnesses to be present at trial; rather, it appears the prosecutor was willing to allow the witnesses to disregard the subpoenas and, instead, seek a continuance. The grant or denial of a continuance in a criminal case lies largely in the sound discretion of the trial court. *State v. Adamson*, 197 Kan. 486, Syl. ¶ 1, 419 P.2d 860 (1966). Under the circumstances in this case we cannot say the trial judge abused his discretion in denying the State's motion to continue.

Upon dismissing the second case the trial court found that the dismissal of the first case was not a matter of necessity. The State claims that because the testimony of the two doctors was vital to the chain of forensic evidence the motion to dismiss was a matter of necessity. However, the witnesses were unavailable because, despite the trial court's prior admonition, the State was apparently unwilling to enforce the subpoenas ordering the witnesses to appear at trial, in order to accommodate their personal schedules. We cannot agree that accommodation of witnesses is a

matter of necessity. A criminal trial is a serious affair to which both federal and state constitutions guarantee due process of law and other rights, such as the right to confront witnesses and the right to speedy trial. A person who is to be a witness in a criminal trial may be personally inconvenienced by having to appear; however, such inconvenience is overshadowed by a defendant's fundamental right to fair adjudication of his case in the administration of criminal justice. It is the primary responsibility of the parties to ensure the attendance of witnesses in court, and it is generally accepted that where the party seeking a continuance has failed to exercise due diligence to procure the attendance of necessary witnesses, the continuance may be properly denied. See *State v. Daigle*, 220 Kan. 639, 644, 556 P.2d 400 (1976), *cert. denied* 430 U.S. 983 (1977); *State v. Hoggard*, 146 Kan. 1, 3, 68 P.2d 1092 (1937); 22A C.J.S., Criminal Law §§ 486, 503b(1), 513(3); 3 Wharton's Criminal Procedure § 428 (12th ed. 1975).

We agree with the decision of the Court of Appeals in *Hunt* finding *Cuezze* to be controlling in this situation. Where, as here, the dismissal of criminal charges results from the State's own motion and is not accompanied by a showing of necessity, and a new information is filed charging the same offense, we hold that when calculating the speedy trial time requirement of K.S.A. 22-3402 a court must include the time elapsed between arraignment and dismissal of the first prosecution together with the time elapsed between arraignment and trial of the second prosecution. A contrary rule would allow the State to dismiss and refile charges against a defendant *ad infinitum* which would contravene the purpose of K.S.A. 22-3402 and could lead to an abuse of legal process.

The judgment of the lower court is affirmed.

MILLER, J., dissenting: The State, for good reason, sought and was granted one continuance; the defendant, also for good reason, was granted two continuances. The case was finally set for trial on March 11 and 12, 1982. When the prosecutor learned, among other things, that one of his subpoenaed medical witnesses was scheduled to take the Minnesota medical board examinations at the time fixed for trial and another was planning to be out of state, he sought a second continuance, asking the court for a different trial setting. For this kindly and under-

standing gesture, the prosecutor is soundly criticized by the majority, who would have required the enforcement of the subpoenas, medical board and the doctors' careers notwithstanding. The trial court denied the request without making any attempt to fix a trial date on which the witnesses could be present. The ultimatum to the prosecutor was loud and clear: Try the case on March 11, witnesses or not, or dismiss. The only reason advanced by the trial court in denying the continuance was that the Supreme Court, by its GUIDELINES and its constant harping on the prompt disposition of cases, is forcing trial judges to overlook the equities and justice of matters before them and to consider only one thing—the speedy termination of cases. This is not the first time we have heard this philosophy stated and seen it relied upon, and it will not be the last. An affirmance in this case will reinforce this erroneous, unfortunate, and all too widespread belief.

Our GUIDELINES are not designed to encourage trial courts to run roughshod over litigants and witnesses. These people deserve to be treated with understanding and consideration, even though it may take a few days longer to complete a given case. In my judgment, this case should have been rescheduled ten days or two weeks later, tried, and finished; the one physician could have taken his Minnesota board, the other could have attended the New York conference, and no one would have been inconvenienced. There is absolutely nothing in the record to suggest that this could not have been done.

Since the State was compelled to dismiss the original case, the *Cuezze* doctrine should not be applied.

McFARLAND and HERD, JJ., join the foregoing dissenting opinion.

McFARLAND, J., dissenting: I believe the majority opinion has approached the issue from the wrong direction. Rather than mechanically adding the two prosecutions together and then determining whether, on June 7, 1982, the State had made an adequate showing of necessity as of that date to extend the 180-day speedy trial limitation of K.S.A. 22-3402, I believe the proper focus should be on the circumstances of the March 5, 1982, dismissal of the first case. If the first case was dismissed upon a showing of good cause, was not occasioned by the State's

lack of diligence, was not prejudicial to any rights of the defendant, and was not done as a part of any plan or scheme by the State to harass defendant, defeat the statutory speedy trial requirements, or in furtherance of other bad-faith motives, then the two prosecutions should not be added together in considering the speedy trial question.

In reviewing the circumstances leading to the dismissal of the first case, I find the following facts to be particularly pertinent.

On March 4, 1982, the State moved for a continuance of the March 11, 1982, trial date, filing the following affidavit in support thereof:

AFFIDAVIT

"Comes now Steven L. Opat, of lawful age, having first been sworn upon his oath, hereby states and avers:

"That he is the chief prosecutor in case number 81-CR-339, captioned in re: State vs. Peter Ransom and advises the Court of the following:

"That this matter is set for trial on the 11th and 12th days of March, 1982; that all witnesses were subpoenaed shortly after the last hearing, where the defendant obtained a continuance for the reason that a key witness was unavailable.

"That speaking with certain witnesses, affiant has learned that Doctors Alex Scott and Gerald Daniels will be out of the jurisdiction of this Court for the following reasons;

"That Doctor Alex Scott, who is vital to the chain of evidence concerning certain forensic evidence which will be introduced at the trial of this case, will be in New York City, New York, attending a professional meeting for which he has had a long standing commitment;

"That Doctor Daniels, who initially examined the victim in this case will be in the State of Minnesota taking his boards which must be accomplished in furtherance of his professional medical career;

"That affiant has also learned that Curtis Barefield, an essential witness, has absconded the jurisdiction of the Court, said Barefield being on probation from the District Court of Geary County, Kansas;

"That these witnesses are essential to the State's case and without their testimony, the State cannot proceed to trial as scheduled;

"Further affiant saith naught.

/s/ Steven L. Opat
Geary County Attorney"

These statements, which have never been controverted, show necessity. Dr. Daniels was scheduled to take his "boards" in Minnesota, which is clearly a date not within his control to alter. The taking of "boards" by a physician is a significant event in his professional career. Dr. Daniels was a key witness for the State as he was the physician who had initially examined the victim and had taken the samples from her which comprised the "Rape

Kit." These samples were the basis for much of the testimony of the State's expert from the Kansas Bureau of Investigation Laboratory.

Dr. Scott was the physician who, by Court order, had taken blood samples, saliva samples and pubic hairs from the defendant and submitted same to the Kansas Bureau of Investigation Laboratory. Based upon the testimony of these two physicians, K.B.I. chemist Eileen Burnau was prepared to show the victim's attacker was within a certain percentage of the male population which included defendant. Dr. Scott was obviously an important witness in the case and there is no showing that his commitment to the New York City meeting was a ruse, not of significant importance to him, or could have been rescheduled.

Curtis Barefield was a witness the State intended to call to testify as to defendant's prior inconsistent statements and declaration against penal interest.

The March 5, 1982, hearing on the State's motion for continuance is illuminating. The transcript of that hearing, in relevant part, is as follows:

"Now the Court wants to take up the matter of the proposed—or, requested continuance.

"MR. CHARTIER [defense counsel]: Your Honor, in regard to the defendant, the only thing I can say is I know I went through this matter the last time and we requested a continuance because of some unavailability of witnesses and *I understand Mr. Opat's dilemma and so I am not going to personally object to it because—and there are some witnesses that are out of state that, in his affidavit, that we would, as far as the defendant is concerned, would like to have them present to testify personally in the matter.*

. . . .

"THE COURT: . . . My problem is, as I recall, this is a case that's now been continued three times.

"MR. OPAT: It has.

"THE COURT: And *we now have a computer friend that oversees us* to the point that it even knows what the median time of disposition of our felony criminal work is.

*"The Court finds that no prejudice will occur to the defendant if the matter is dismissed without prejudice*; that the matter has been pending a sufficient length of time for trial but for the *technical problems which* do *sometimes arise* in the trial of criminal cases; the *Court finds that it is neither the fault of the State nor of the defendant that the present technical problems present themselves. The Court does not believe that further continuance of the case is the proper way to handle the case, considering the guidelines furnished by the Supreme Court for the handling of criminal cases and the Court specifically finds that neither side is operating tactically to try to gain an advantage over the other* in their positions stated here today.

"Since the matter has not been considered on its merits and since the Court has made the aforementioned findings and since the *Court does not find lack of diligence on anybody's part*, the Court believes the appropriate handling of the case is to deny the motion to continue at this time.

"MR. OPAT: I would like to, at this time, make an oral motion that I be allowed to dismiss the matter without prejudice, pursuant to the Court's ruling.

"THE COURT: Mr. Chartier?

"MR. CHARTIER: I have no objection to that.

"THE COURT: Again, reiterating the findings just announced with respect to the motion to continue, the motion to dismiss is granted." (Emphasis supplied.)

As noted in the majority opinion, we said in *State v. Cuezze, Houston & Faltico*, 225 Kan. 274, 589 P.2d 626 (1979):

"As we said in *Warren* [224 Kan. 454, 580 P.2d 1336 (1978)], the purpose of K.S.A. 22-3402 is to implement and define the constitutional guarantee of a speedy trial and the statute establishes certain maximum time limits within which a defendant must be brought to trial. *Absent a showing of necessity*, the State cannot dismiss a criminal action and then refile the identical charges against the same defendant and avoid the time limitations mandated by the statute. As pointed out by the trial court, our prior cases relied upon by the State arose out of different factual situations or issues than those now before the court. It should also be noted that *no attempt was made by the State to secure additional time in the first case to develop evidence* as contemplated by K.S.A. 1978 Supp. 22-3402(3)(c)." 225 Kan. at 278. (Emphasis supplied.)

The trial court found: (1) technical problems had developed in the case which were not the fault of either party; (2) no prejudice to the defendant would result from a dismissal; (3) neither side was trying to gain a tactical advantage over the other; and (4) both parties had acted diligently. Inherent in these findings is the showing of "necessity" referred to in *Cuezze*.

Additionally the State did attempt to secure additional time—a significant factor referred to in *Cuezze*. Further, the defendant desired the presence of the witnesses. It was the trial court's idea to dismiss the case out of concern for statistics kept by the Judicial Administrator. The trial court simply did not want to be charged statistically with a case whose termination would exceed the guidelines fixed by our court. These guidelines are purely intramural in nature and are merely guidelines which were developed for purposes of improving judicial administration. They do not and cannot alter or affect any rights of litigants. They are matters wholly within the court system itself.

The dismissal of the first case was clearly upon a showing of necessity. In my view, that finding is determinative of the issue

before us and precludes adding the two cases together for statutory speedy trial purposes. The second case did not exceed the 180-day period, so no issue of speedy trial arises.

I would reverse and remand the case for trial.

MILLER and HERD, JJ., join the foregoing dissenting opinion.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF KANSAS

State of Kansas,

Appellant,

vs. No. 82-54636-S

Peter H. Ransom,

Appellee.

You are hereby notified of the following action taken in the above entitled case:

MOTION FOR REHEARING.

GRANTED.

Date: May 6, 1983

Yours very truly,

LEWIS C. CARTER
Clerk, Supreme Court

No. 54,636

STATE OF KANSAS, *Appellant*, v. PETER H. RANSOM, *Appellee*.

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Speedy Trial—Dismissal and Refiling of Criminal Case—Computation of Time for Applying Speedy Trial Statute.* Where the State dismisses a pending criminal case without making a showing of necessity, and then files a second case charging the same defendant with the same offense, a court must include the time elapsed between arraignment and dismissal of the first prosecution together with the time elapsed between arraignment and trial of the second prosecution, when calculating time for the purpose of applying K.S.A. 22-3402, the Kansas speedy trial statute.
2. SAME—*Speedy Trial—Dismissal and Filing of Criminal Case—Computation of Time for Applying Speedy Trial Statute.* Where the State dismisses a pending criminal case upon a showing of necessity and then files a second criminal case charging the same defendant with the same offense, the computation of time for the purpose of applying K.S.A. 22-3402 commences from the time the defendant is arraigned in the second case.

Appeal from Geary District Court; WILLIAM D. CLEMENT, judge. Opinion on rehearing filed December 2, 1983. (For original opinion affirming see 233 Kan. 185, 661 P.2d 392 [1983].) Reversed on rehearing.

*Steven L. Opat*, county attorney, argued the cause, and *Robert T. Stephan*, attorney general, was with him on the brief for appellant.

*Charles A. Chartier*, of Junction City, argued the cause and was on the brief for appellee.

The opinion of the court was delivered by

MILLER, J.: This appeal by the State from an order dismissing an information charging the defendant with aggravated kidnapping, rape, aggravated battery and aggravated robbery was heard by this court in January 1983, and a divided court affirmed the dismissal. The Chief Justice's opinion, accurately stating the facts, the issue, and the decision of the majority, was filed on March 31, 1983. *State v. Ransom*, 233 Kan. 185, 661 P.2d 392 (1983). In May, we granted a rehearing. The appeal was reargued by counsel, and we now reverse.

The facts are fully set forth in the earlier opinion. The defendant was arraigned in Geary District Court in case No. 81 CR 399 on August 13, 1981, on charges of aggravated kidnapping, rape, aggravated battery and aggravated robbery. On March 4, 1982, the State requested a continuance, citing as grounds its difficulty in obtaining the presence of three witnesses, including two doctors who planned to be out of state on the proposed trial date. On March 5, the trial court denied the requested continu-

ance, and the State immediately moved to dismiss the case without prejudice. That motion was granted. At that time, 121 days were chargeable to the State. Defendant had been free on bond. Four days later a new case, No. 82 CR 111, was filed. The new case charged the defendant with the same offenses. Defendant was arraigned on March 31, 1982. Trial was set to commence on May 3, 1982. The State again experienced trouble securing the attendance of an out-of-state medical witness, and moved for a continuance. The trial court granted the motion on April 30 and set the case for trial at 8:30 o'clock a.m., on June 9, 1982. On June 7, defendant moved for discharge and the trial court sustained that motion. The court found that under the doctrine adopted by this court in *State v. Cuezze, Houston & Faltico*, 225 Kan. 274, 589 P.2d 626 (1979), the time spans chargeable to the State in the two cases must be totalled; that the defendant had been held to answer in both cases for a total of 189 days; and that since the State had failed to bring him to trial within the 180-day period prescribed by K.S.A. 22-3402(2), he was entitled to be discharged. That statute provides as follows:

"(2) If any person charged with a crime and held to answer on an appearance bond shall not be brought to trial within one hundred eighty (180) days after arraignment on the charge, such person shall be entitled to be discharged from further liability to be tried for the crime charged, unless the delay shall happen as a result of the application or fault of the defendant, or a continuance shall be ordered by the court under subsection (3)."

The delay in this case did not happen as a result of the application or fault of the defendant, and no continuance was ordered by the trial court under subsection three.

In addition to *Cuezze*, two other cases involving our speedy trial statute should be discussed. In *State v. Fink*, 217 Kan. 671, 538 P.2d 1390 (1975), we held that the time limitations of K.S.A. 22-3402 do not commence to run until a defendant is arraigned, and that the time between arrest and arraignment is not to be included in computing the 90-day or 180-day periods within which the accused must be brought to trial. In *Fink*, the original proceeding was dismissed prior to arraignment, and thus the statute did not come into play. In *State v. Hunt*, 8 Kan. App. 2d 162, 651 P.2d 967 (1982), the defendant was originally charged with aggravated assault and unlawful use of weapons. Hunt was arraigned on November 10, 1980. On March 31, 1981, the date on which trial was to take place, the State moved to dismiss the

charges without prejudice as one of the State's witnesses could not be located. The witness was not an "essential" witness, and the State did not make a showing of necessity. On April 3, 1981, a new information was filed charging Hunt with aggravated battery, unlawful use of weapons, and making a terroristic threat. That information was amended before Hunt was arraigned, altering the aggravated battery charge to aggravated assault, and dropping the terroristic threat charge. On May 13, 1981, the defendant was arraigned on the amended information. A jury trial was held on July 27, 1981, 75 days after arraignment in the second case, but 259 days after arraignment in the original case. The Court of Appeals reversed Hunt's conviction on the aggravated assault charge, holding that since the State dismissed the original prosecution without showing necessity, the time between arraignment and dismissal on the original charge had to be added to the time between arraignment and trial in the second case in order to calculate the 180-day period allowable by statute. When this was done, it was readily apparent that the time had expired prior to trial and Hunt was entitled to be discharged. The decision was based upon our holding in *Cuezze*, which the Court of Appeals held to be controlling. Due to factual differences, neither *Fink* nor *Hunt* is helpful here.

We turn now to the *Cuezze* case. K.S.A. 22-3402 does not deal with the voluntary dismissal of charges by the State and the inclusion of like charges in a new or subsequent complaint or information. We dealt with that problem in *Cuezze*. There, Cuezze and Houston were charged in the original information with two counts of making a false writing and two counts of conspiracy. Both were arraigned on those charges, Houston on May 20, 1977, and Cuezze on June 13, 1977. In May 1977, the State secured additional information linking Faltico to the illegal conduct. Over three months later, in September 1977, the State filed a new case against Cuezze, Houston and Faltico, and sometime thereafter the State dismissed the original case against Cuezze and Houston. Both defendants were arraigned on the new charges on January 19, 1978. The trial court dismissed the charges against both Cuezze and Houston on May 18, 1978, and we affirmed that dismissal, finding that K.S.A. 22-3402(2) had been violated. We said:

"As we said in *Warren* [*State v. Warren*, 224 Kan. 454, 457, 580 P.2d 1336

(1978)], the purpose of K.S.A. 22-3402 is to implement and define the constitutional guarantee of a speedy trial and the statute establishes certain maximum time limits within which a defendant must be brought to trial. *Absent a showing of necessity*, the State cannot dismiss a criminal action and then refile the identical charges against the same defendant and avoid the time limitations mandated by the statute. As pointed out by the trial court, our prior cases relied upon by the State arose out of different factual situations or issues than those now before the court. It should also be noted that no attempt was made by the State to secure additional time in the first case to develop evidence as contemplated by K.S.A. 1978 Supp. 22-3402(3)(*c*)." (Emphasis supplied.) 225 Kan. at 278.

In Kansas, we recognize both the constitutional right to a speedy trial and the right to a speedy trial enunciated by K.S.A. 22-3402. See *State v. Rosine*, 233 Kan. 663, 664 P.2d 852 (1983), where both rights are fully discussed and distinguished. Here, there is no claim of a constitutional violation. In this case we are only concerned with the statutory right.

*Cuezze* establishes the principle that the State cannot dismiss a criminal action and commence a new one containing identical charges—absent a showing of necessity—and avoid the time limitations of K.S.A. 22-3402. We have not decided what constitutes *a showing of necessity* under *Cuezze*, nor have we determined what time limitations apply if the State does dismiss and refile *upon a showing of necessity*.

The literal language of *Cuezze* implies that the time chargeable to the State in the first action is to be added to that accrued in the second action *only* if the dismissal is made *without* a showing of necessity; ergo, if the dismissal is made *with* a showing of necessity, the computation of the statutory time, whether it be 90 or 180 days, commences anew upon the filing of the second case and arraignment therein. This is logical, and we so hold. See *State v. Haislip*, 234 Kan. _____, _____ P.2d _____ (1983). To avoid the statutory time limitations, the State must make a showing of necessity.

We turn now to the facts in the case before us in order to determine whether the State made a showing of necessity at the time it dismissed the original case against Ransom. The State moved for a continuance of the trial date for the reason that one witness had absconded and two of its principal witnesses had serious conflicts with the trial setting. Both of the latter were physicians; one was stationed at Fort Riley, Kansas, at the time the offense was committed, and both were significant and important State witnesses. One had conducted the initial examina-

tion of the victim and had taken the "rape kit" which was submitted to the Kansas Bureau of Investigation laboratory. The other had taken blood samples, saliva samples, and pubic hairs from the defendant, pursuant to the Court's order, and these had been submitted to the same laboratory for examination and comparison. The testimony of both witnesses was thus necessary to lay the foundation for the critical expert testimony. Dr. Daniels was not a local resident; he was only temporarily stationed at Fort Riley, and he had left that station and had been separated from the military service before the case could be tried. Dr. Daniels was scheduled to take his Minnesota medical board examinations at the time of trial. This event, as Justice McFarland pointed out in her dissent to the original opinion, 233 Kan. at 194, is a significant event in a physician's professional career and not a date which he can control or alter. The other physician had a long-standing commitment to attend a professional meeting in New York City. The trial court, upon hearing the State's motion, made the specific findings set forth verbatim in Justice McFarland's dissent, 233 Kan. at 195-96. In short, the court found that no prejudice would occur to the defendant if the matter was dismissed without prejudice; that technical problems in securing the appearance of witnesses had arisen; that these problems were neither the fault of the State nor of the defendant; that neither side was operating tactically to try to gain an advantage over the other; and that both parties had acted diligently. The court concluded, however, that in view of the Guidelines adopted by the Supreme Court for the handling of criminal cases, the motion for a continuance must be denied. The State promptly moved to dismiss without prejudice. The journal entry accurately reflects this action:

"WHEREUPON, the Court considers the motion of the State for a continuance. The Court entertains the statements of counsel and ascertains that there is no objection from the defendant to the continuance proposed by the State of Kansas. The Court further considers the file in this case and the reasons proffered by the State for the proposed continuance. The Court specifically notes that this case has been continued three (3) times previously and the Court further notes that the County Attorney has exercised due diligence in attempting to secure the attendance of the witnesses essential to this cause. In considering the Motion, the Court finds, however, that certain guidelines proposed by the Supreme Court must likewise be considered in determining whether or not the motion should be granted. The Court, therefore, finds based on the evidence previously adduced before it, based upon the evidence presented herein, and based upon the

guidelines and case law which pertains to the issues raised herein, that the motion for a continuance should not be granted. The Court specifically finds that in denying said motion, however, that the State is not attempting to obtain a tactical advantage in seeking a continuance, that no prejudice has adhered to the defendant thus far, in terms of his right to a speedy trial as the same is statutorily defined.

"The Court finds that neither party has been less than diligent in their efforts to bring this matter to trial.

"WHEREUPON, the State moves to dismiss this matter without prejudice, stating to the Court that the same being a need of necessity since the State is unable to proceed without the testimony of the three (3) witnesses that were mentioned in their affidavit.

"WHEREUPON, the Court, based on its previous rulings and hearing no objection from the defendant's counsel, finds that the matter should be dismissed without prejudice. The Court further adopts its previous rulings. . . .

"IT IS SO ORDERED."

While the judge did not specifically find that the State made a showing of necessity, such a finding is implicit in the record and in the findings made. The State had its witnesses under subpoena, but it was wary lest, in the face of the serious conflicting commitments, the witnesses would not appear. If the State proceeded with trial and either one of the witnesses failed to appear, the State's case would be badly crippled. True, the State could later cite the witness for contempt, but that would not fill the resulting void in the State's presentation of its criminal case against the defendant. Witnesses do not always appear, even though they are ordered to do so. Some are stricken on the way to the courthouse; others are hospitalized and undergo surgery. Such problems cannot be anticipated. Other conflicts, however, can. Professional examinations, such as bar, medical and dental examinations, are given only at stated times and places; and an aspiring professional might well be tempted to ignore a subpoena which conflicted with such an examination, even in light of the probable contempt citation. The State anticipated this and sought a different trial setting within the remaining 59 days available to it within the statute. Upon the denial of its motion for a continuance, the State dismissed and refiled rather than chance a trial at which one or more vital witnesses would be absent.

Upon this record, we conclude that the State made a showing of necessity. The *Cuezze* doctrine, therefore, is inapplicable. The dismissal being made upon a showing of necessity, the computation of the statutory time commenced anew. One hun-

dred eighty days had not expired from the date of arraignment, March 31, 1982, to the date of dismissal.

The judgment is reversed, with instructions to set aside the dismissal.

LOCKETT, J., concurring: *State v. Ransom* was set for trial May 3, 1982. The 180-day limitation imposed by K.S.A. 22-3402 had not expired. On April 30, 1982, prior to the trial date, the State requested a continuance because it was unable to contact a necessary witness. The trial court granted the State a continuance; later the judge notified the parties by letter he had rescheduled the trial for June 9, 1982. The State's necessary witness, who had received his subpoena, appeared to testify May 3, 1982.

Court dockets and trial settings are controlled by the courts. The trial judge had the choice when to set the case for trial; he alone chose June 9, 1982. The trial court's decision to set the June 9, trial date fell within the time limitation imposed by K.S.A. 22-3402 because K.S.A. 22-3402(3)(*d*) allows an additional 30 days to be added to the 180-day limitation for trial. Therefore, the June 9, 1982, trial setting was not in violation of K.S.A. 22-3402.

SCHROEDER, C.J., dissenting: It is respectfully submitted the judgment of the trial court should be affirmed for all of the reasons stated in the original opinion filed in this case on March 31, 1983. *State v. Ransom,* 233 Kan. 185, 661 P.2d 392 (1983).

The only additional information submitted to the court on the rehearing of this case was the admission of the prosecuting attorney in oral argument that the essential witness upon whom the State was depending for its case, a doctor who conducted the original examination of the victim and obtained evidence for the "rape kit," and who had been subpoenaed to appear on May 3, 1982, the date set for trial, appeared in his office pursuant to the subpoena on May 3, 1982. It was the absence of this witness, whom the prosecuting attorney considered essential and unavailable, that led to the dismissal of the original charges filed against the defendant and, after the refiling of identical charges, the subsequent continuance sought by the prosecuting attorney. Clearly, this fortifies the decision of the trial court that the State failed to bring the defendant to trial within the 180-day time limitation, and that there was no necessity for a continuance.

PRAGER and HOLMES, JJ., join in the above dissent.

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF KANSAS

State of Kansas,

Appellant,

vs. No. 82-54636-S

Peter H. Ransom,

Appellee.

You are hereby notified of the following action taken in the above entitled case:

Motion by Appellee for Rehearing.

DENIED.

Date: January 20, 1984

Yours very truly,

LEWIS C. CARTER
Clerk, Supreme Court

APPENDIX E

K.S.A. 22-3402. DISCHARGE OF PERSONS NOT BROUGHT PROMPTLY TO TRIAL. (1) If any person charged with a crime and held in jail solely by reason thereof shall not be brought to trial within ninety (90) days after such person's arraignment on the charge, such person shall be entitled to be discharged from further liability to be tried for the crime charged, unless the delay shall happen as a result of the application or fault of the defendant, or a continuance shall be ordered by the court under subsection (3).

(2) If any person charged with a crime and held to answer on an appearance bond shall not be brought to trial within one hundred eighty (180) days after arraignment on the charge, such person shall be entitled to be discharged from further liability to be tried for the crime charged, unless the delay shall happen as a result of the application or fault of the defendant, or a continuance shall be ordered by the court under subsection (3).

(3) The time for trial may be extended beyond the limitations of subsections (1) and (2) of this section for any of the following reasons:

(a) The defendant is incompetent to stand trial;

(b) A proceeding to determine the defendant's competency to stand trial is pending and a determination thereof may not be completed within the time limitations fixed for trial by this section;

(c) There is material evidence which is unavailable; that reasonable efforts have been made to procure such evidence; and that there are reasonable grounds to believe that such evidence can be obtained and trial commenced within the next succeeding ninety (90) days. Not more than one continuance may be granted the state on this ground, unless for good cause shown, where the original con-

tinuance was for less than ninety (90) days, and the trial is commenced within one hundred twenty (120) days from the original trial date;

(d) Because of other cases pending for trial, the court does not have sufficient time to commence the trial of the case within the time fixed for trial by this section. Not more than one continuance of not more than thirty (30) days may be ordered upon this ground.

(4) In the event a mistrial is declared or a conviction is reversed on appeal to the supreme court or court of appeals, the time limitations provided for herein shall commence to run from the date the mistrial is declared or the date of the mandate of the supreme court or court of appeals is filed in the district court.

EDITOR'S NOTE

PAGES App F thru END WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

## Article 21.—APPEALS

**Cross References to Related Sections:**

Rules of supreme court relating to supreme court, court of appeals and appellate practice, see 60-2701a

**Law Review and Bar Journal References:**

Reduction supreme court case load discussed, "Highlights of the Kansas Code of Civil Procedure (1963)," Spencer A. Gard, 2 W.L.J. 189, 202 (1962)

**60-2101. Appellate jurisdiction of court of appeals and supreme court; administrative appeals to district court.** (a) The court of appeals shall have jurisdiction to hear appeals from district courts, except in those cases reviewable by law in the district court and in those cases where a direct appeal to the supreme court is required by law. The court of appeals also shall have jurisdiction to hear appeals from administrative decisions where a statute specifically authorizes an appeal directly to the court of appeals from an administrative body or office. In any case properly before it, the court of appeals shall have jurisdiction to correct, modify, vacate or reverse any act, order or judgment of a district court to assure that any such act, order or judgment is just, legal and free of abuse. Appeals from the district court to the court of appeals in criminal cases shall be subject to the provisions of K.S.A. 22-3601 and 22-3602, and any amendments thereto, and appeals from the district court to the court of appeals in civil actions shall be subject to the provisions of K.S.A. 60-2102, and any amendments thereto.

(b) The supreme court shall have jurisdiction to correct, modify, vacate, or reverse any act, order, or judgment of a district court or court of appeals in order to assure that any such act, order or judgment is just, legal, and free of abuse. An appeal from a final judgment of a district court in any civil action in which a statute of this state or of the United States has been held unconstitutional shall be taken directly to the supreme court. Direct appeals from the district court to the supreme court in criminal cases shall be as prescribed by K.S.A. 22-3601 and 22-3602, and any amendments thereto. Cases appealed to the court of appeals may be transferred to the supreme court as provided in K.S.A. 20-3016 and 20-3017, and any decision of the court of appeals shall be subject to review by the supreme court as provided in subsection (b) of K.S.A. 20-3018, except that any party may appeal from a final decision of the court of appeals to the supreme court, as a matter of right, whenever a question under the constitution of either the United States or the state of Kansas arises for the first time as a result of such decision.

(c) As used in the code of civil procedure, the term "appellate court" means the supreme court or court of appeals, depending on the context in which such term is used and the respective jurisdiction of such courts over appeals in civil actions as provided in this section and K.S.A. 60-2102, and any amendments thereto.

(d) A judgment rendered or final order made by an administrative board or officer exercising judicial or quasi-judicial functions may be reversed, vacated or modified by the district court on appeal. If no other means for perfecting such appeal is provided by law, it shall be sufficient for an aggrieved party to file a notice that such party is appealing from such judgment or order with such board or officer within thirty (30) days of its entry, and then causing true copies of all pertinent proceedings before such board or officer to be prepared and filed with the clerk of the district court in the county in which such judgment or order was entered. The clerk shall thereupon docket the same as an action in the district court, which court shall then proceed to review the same, either with or without additional pleadings and evidence, and enter such order or judgment as justice shall require. A docket fee shall be required by the clerk of the district court as in the filing of an original action.

**History:** L. 1963, ch. 303, 60-2101; L. 1974, ch. 168, § 7; L. 1975, ch. 178, § 27; L. 1976, ch. 251, § 29; L. 1977, ch. 112, § 24; May 14.

**Source or prior law:**

(a) L. 1884, ch. 93, § 1; G.S. 1868, ch. 80, §§ 540, 541; L. 1900, ch. 182, § 564; R.S. 1923, 60-3301.

(b) L. 1865, ch. 53, § 1; G.S. 1868, ch. 80, § 542; L. 1901, ch. 278, § 1; L. 1907, ch. 256, § 1; L. 1909, ch. 182, § 565; L. 1915, ch. 187, § 1; R.S. 1923, 60-3302.

**Revisor's Note:**

1975 amendment to this section repealed by L. 1976, ch. 251, § 38.

**Cross References to Related Sections:**

Counterclaim and cross-claims, appealed or removed actions, see 60-213(f).

are to file is result of excusable neglect. Davis v. State, 204 K. 816, 815, 466 P.2d 311.

2. Failure to timely comply with filing provisions of rule, cross-appeal dismissed. State, *ex rel.*, v. Koscot Interplanetary, Inc., 212 K. 668, 670, 671, 512 P.2d 416.

3. Briefs presented to trial court not properly part of record on appeal; one-half cost of printing taxed to attorney personally. *In re* Estate of Hannah, 215 K. 892, 900, 529 P.2d 154.

4. Motion to intervene denied; permission to file *amicus curiae* brief under subsection (*h*) granted. Leek v. Theis, 217 K. 784, 789, 539 P.2d 304.

5. In interests of justice appeal not dismissed although subsection (b)(2) not complied with. Kansas Bankers Surety Co. v. Scott, 225 K. 200, 202, 589 P.2d 575.

6. Motion to dismiss for failure to prepare brief in compliance with this rule overruled. Wiehe v. Kukal, 225 K. 478, 480, 592 P.2d 860.

7. Failure of briefs to conform to requirements of subsection (b) commented on. Curtis v. Freden, 224 K. 646, 648, 585 P.2d 993.

### Rule No. 9

1. Cited, right to court-appointed counsel. Chance v. State, 195 K. 430, 432, 407 P.2d 236.

### Rule No. 10

1. The bench and bar admonished to give juvenile court cases involving waiver of jurisdiction the preferential treatment that justice and public interest require. *In re* Long, 202 K. 216, 218, 448 P.2d 25.

2. Counsel for defendant not permitted to argue where failure to file brief. Whiteley v. O'Dell, 219 K. 314, 316, 548 P.2d 798.

### Rule No. 13

1. Appeals from summary judgments; cases consolidated by stipulation, summary judgment not a trial by affidavits. Lee v. Mobil Oil Corporation, 203 K. 72, 73, 452 P.2d 857.

2. Applied; actions to recover money due, application of proceeds of collateral to debts. State Bank of Downs v. Moss, 203 K. 447, 448, 454 P.2d 554.

3. Appeals consolidated hereunder, court had no authority to modify or amend condemnation award. Unified School District v. Turk, 219 K. 655, 657, 549 P.2d 882.

### Rule No. 16

1. Applied, notice of appeal held timely filed. Security National Bank v. City of Olathe, 225 K. 220, 221, 589 P.2d 589.

2. Applied in holding appeal from conviction of perjury timely filed. State v. Brady, 2 K.A.2d 382, 383, 580 P.2d 434.

3. Purpose of rule and its successor, Rule 2.03, discussed. Carson v. Eberth, 3 K.A.2d 183, 186, 592 P.2d 113.

### Rule No. 17

1. Applied, court erred in suppressing evidence, warrantless search incident to valid arrest. State v. Tygart, 215 K. 409, 415, 524 P.2d 753.

2. Order suppressing evidence on grounds of illegal seizure held proper. State v. Youngblood, 220 K. 782, 556 P.2d 195.

**Supreme Court Reporter's Note:**

Rules are current through July 31, 1981, incorporating all reported amendments through 230 Kan. Advance Sheet No. 1. In addition, historical notations to rules indicating effective dates of new rules, repealed rules, and amendments since January 10, 1977, are included in brackets following applicable rules.

## 60-2701a. Supreme Court, Court of Appeals and Appellate Practice.

### GENERAL AND ADMINISTRATIVE

**Rule No. 1.01. Prefatory Rule.** (a) *Rules Adopted.* The following Rules of the Supreme Court numbered 1.01 through 9.01 are hereby adopted effective January 10, 1977.

(b) *Repeal of Former Rules.* All rules of the Supreme Court relating to appellate practice, numbers 1 through 18, which are in effect immediately prior to the effective date of these rules are hereby repealed as of January 10, 1977, except that they shall continue to govern any appeal in which the notice of appeal was filed prior to that date, unless the parties stipulate that these rules or some portion of them shall apply and such stipulation is approved by the appellate court.

(c) *Statutory References.* In these rules, whenever there is a reference to a section of a statute by number it shall be deemed to be a reference to the Kansas Statutes Annotated or Supplement or amendment thereto unless a different statute is indicated.

(d) *The Clerk.* The clerk of the Supreme Court is clerk of the Court of Appeals and is referred to in these rules as "the clerk of the appellate courts."

(e) *Applicability.* All rules relating to appellate practice shall be applicable to both civil and criminal appeals, and govern procedure in both the Court of Appeals and the Supreme Court, unless otherwise indicated.

**Rule No. 1.02. Chief Judge of the Court of Appeals.** The Chief Judge of the Court of Appeals shall have the following administrative powers:

(a) To designate and number hearing panels, assign judges to such panels, and designate the presiding judge of each panel of which he is not a member.

time for the filing of a petition for review by the Supreme Court.

(b) If no motion for rehearing is filed, or a motion for rehearing is denied, and no motion for review is pending under Rule No. 8.03 and the time for filing the same has expired, the clerk of the appellate courts shall, unless the court otherwise orders, issue a mandate on the decision of the Court of Appeals to the district court together with a copy of the opinion.

**Rule No. 7.06. Rehearing or Modification in Supreme Court.** (a) A motion for rehearing or modification in a case decided by the Supreme Court may be served within twenty (20) days of the date of the decision. The issuance of the mandate shall be stayed pending the determination of the issues raised by such a motion. If a rehearing is granted, such order suspends the effect of the original decision until the matter is decided on rehearing.

(b) If no motion for rehearing is filed or upon denial of a motion for rehearing, the clerk of the appellate courts shall, unless the court otherwise orders, issue a mandate on the decision of the Supreme Court to the district court together with a copy of the opinion.

**Rule No. 7.07. Costs and Fees.** (a) *General.* In any case there shall be separately assessed when applicable all fees for service of process, witness fees, reporter's fees, allowance for fees and expenses of a master or commissioner appointed by the appellate court, and any other proper fees and expenses. All such fees and expenses shall be approved by the appellate court unless specifically fixed by statute. When any such fees and expenses are to be anticipated in a case, the appellate court may require the parties to the proceeding to make deposits in advance to secure the same. In disposing of any case before it, an appellate court may apportion and assess any part of the original docket fee, the expenses for transcripts, and any additional fees and expenses allowed in the case, against any one or more of the parties in such manner as justice may require.

(b) *Frivolous Appeals.* If the court finds that an appeal has been taken frivolously, or only for purposes of harassment or delay, it may assess against an appellant or his counsel, or both, the cost of reproduction of the appellee's brief and a reasonable attorney's fee for the appellee's counsel. The mandate shall then include a statement of any such assessment, and execution may issue thereon as for any other judgment, or in an original case the clerk of the appellate courts may cause an execution to issue.

(c) *Unnecessary Transcripts.* On its own motion, or on the motion of an aggrieved party filed not later than ten (10) days after an assessment of costs hereunder, the appellate court may assess against a party or his counsel, or both, all or any part of the cost of the trial transcript which the court finds to have been prepared as the result of any unreasonable refusal to stipulate pursuant to a written request and in accordance with Rule No. 3.03, to the preparation of less than a complete transcript of the proceedings in the district court.

## TRANSFER TO AND REVIEW BY SUPREME COURT

**Rule No. 8.01. Transfer to Supreme Court on Certificate.** Whenever the Court of Appeals shall request that an undetermined case pending before it be transferred to the Supreme Court for final determination, such request shall be by certificate of the Chief Judge of the Court of Appeals filed with the clerk of the appellate courts, accompanied by eight (8) copies. The certificate shall set forth the nature of the case, shall demonstrate that such case is within the jurisdiction of the Supreme Court, and shall show the existence of one or more of the grounds for transfer specified in Sec. 20-3016 (*a*). As may be appropriate, such certificate shall specify:

(a) Which issue or issues are not within the jurisdiction of the Court of Appeals with citation to controlling constitutional, statutory or case authority;

(b) The subject matter of the case which has significant public interest; or

(c) The particular legal questions raised which have major public significance.

If the request is made under Sec. 20-3016 (*a*) (4), the certificate shall contain sufficient data concerning the state of the docket of the Court of Appeals and of the Supreme Court to demonstrate that the expeditious administration of justice requires such transfer.

APPENDIX B

IN THE DISTRICT COURT OF GEARY COUNTY, KANSAS

State of Kansas — Plaintiff

vs. — No. 82-CR-111

Peter H. Hannon — Defendant

ORDER OF CONTINUANCE

Now on this 22nd day of March, 1984, the above captioned matter comes on before the Court upon the defendant's motion filed herein requesting that this matter be continued from the trial setting of April 11 through 13, 1984 pending the determination of the United States Supreme Court regarding the defendant's petition for a writ of certiorari. The State appears by Steven L. Opat, Geary County Attorney and the defendant appears by Roger Thompson, retained counsel of Bengston, Waters, Thompson & Barry, Chtd. of Junction City, Kansas.

WHEREUPON, the Court entertains the statements and arguments of counsel, and notes specifically the objection of the State of Kansas to any continuance herein. The Court notes the file and finds that the State has filed praecipes for subpoenaes herein and that process has been effected and that the State is ready for trial. The Court, however, notes that it would be futile under the circumstances to try this matter pending the determination of the United States Supreme Court herein. The Court finds that the matter should be and is hereby continued pending such determination, and ORDERS that all time from this date forward until the next trial setting shall be charged to the defendant, for the purpose of computing any time concerning his right to a speedy trial as the same is statutorily defined by K.S.A. 22-3402, or as the same may be constitutionally defined. The Court further instructs the State to notify its witnesses that they need not honor the process issued, and further instructs the clerk of the District Court to notify the jury panel that it need not appear on the date scheduled for trial herein.

IT IS SO ORDERED.

JUDGE OF THE DISTRICT COURT

APPROVED:

26276

Steven L. Opat
Geary County Attorney
Courthouse
Junction City, Kansas 66441
(913) 762-4343

Roger W. Thompson
Attorney for the Defendant
1206 West 8th Street
Junction City, Kansas 66441
(913) 762-2901

CERTIFIED COPY
District Court of Geary County, Kansas ss
I, the undersigned clerk of the above named court, hereby certify that the instrument to which this certificate is affixed is a true and correct copy of the original on file in this office.
Dated this 12th day of June 1984
Lorgella Johnson
Deputy County Clerk